

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

11 JENNY K. DANIELS and MARK M.) Case No.: 14-CV-00824-LHK
12 DANIELS,)
13 v.) Plaintiffs,) ORDER GRANTING MOTION TO
14 ALLSTATE INSURANCE COMPANY, an)) DISMISS WITHOUT LEAVE TO
15 Illinois corporation, and DOES 1 through 25,)) AMEND
16 inclusive,)
17 Defendants.)

18

Plaintiffs Jenny and Mark Daniels (“Plaintiffs”) initiated this litigation against their insurer, Allstate Insurance Company (“Defendant”), for breach of insurance contract and breach of the implied covenant of good faith and fair dealing. *See* ECF No. 2. Plaintiffs claim that Defendant had a duty to defend them in underlying litigation brought in Santa Cruz County Superior Court. *See* ECF No. 25.

After the Court granted Defendant’s Motion to Dismiss with leave to amend, *see* ECF No. 23, Plaintiffs filed a first amended complaint, *see* ECF No. 25. Defendant again filed a Motion to Dismiss, arguing once more that no potential for coverage existed under the insurance policy as a matter of law. *See* ECF No. 26. Plaintiffs have filed an Opposition, *see* ECF No. 30, and Defendant has filed a Reply, *see* ECF No. 31.

1 The Court finds this motion suitable for decision without oral argument pursuant to Civil
2 Local Rule 7-1(b) and hereby VACATES the hearing and the Case Management Conference set for
3 October 9, 2014, at 1:30 p.m.

4 Having considered the briefing, the record in this case, and applicable law, the Court
5 GRANTS Defendant's Motion to Dismiss without leave to amend for the reasons stated below.

6 **I. BACKGROUND**

7 **A. The Insurance Policy**

8 Plaintiffs purchased a homeowner's insurance policy (the "Policy") from Defendant in
9 September 2012. The Policy was renewed effective September 2013 and remains in force. ECF
10 No. 25 ¶ 6. Under the Policy, Defendant agrees to indemnify and defend Plaintiffs for damages as
11 follows:

12 Subject to the terms, conditions and limitations of this policy, Allstate will pay
13 damages which an insured person becomes legally obligated to pay because of
14 bodily injury or property damage arising from an occurrence to which this policy
applies, and is covered by this part of the policy.

15 ECF No. 8 at 2. The Policy defines "occurrence" as an "accident, including continuous or repeated
16 exposure to substantially the same general harmful conditions during the policy period, resulting in
17 bodily injury or property damage." ECF No. 2, Ex. A to Pls.' Compl. ("Allstate Policy") at 3.

18 **B. The Underlying Litigation**

19 The instant case arises out of a Santa Cruz County Superior Court lawsuit filed against
20 Plaintiffs by their neighbors, Joyce and Edward Kennedy (the "Kennedys"). The Kennedys and
21 Plaintiffs own adjacent property lots in Santa Cruz, California. Both lots sit on a south-facing
22 hillside, with the Kennedys' property situated below that of the Plaintiffs. ECF No. 2, Ex. B to
23 Pls.' Compl. ("Kennedys' Compl.") ¶ 9. The underlying dispute centered on the replacement of a
24 twenty-year-old, man-made wooden retaining wall located on Plaintiffs' property along the
25 boundary line shared with the Kennedys. *Id.* ¶ 8. The retaining wall, which was built by a
26 previous owner of Plaintiffs' property, supports large amounts of fill soil that keep Plaintiffs'
27 backyard level. *Id.* ¶ 11. In addition, two large fir trees, one located at the east end of the retaining
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1 wall (“Tree 1”) and the other about five feet upslope from the wall’s center (“Tree 2”), have root
2 systems embedded in the fill soil. *Id.* ¶¶ 12-15.

3 From their own property, the Kennedys noticed that Plaintiffs’ retaining wall was
4 collapsing in various places. The Kennedys’ observation prompted them to hire geotechnical
5 engineers and an arborist to examine the condition of the wall and trees. Kennedys’ Compl. ¶ 10.
6 The experts’ reports confirmed that the wall was severely distressed and posed a threat of
7 collapsing from “poor construction, age and/or damage caused by tree roots.” *Id.* ¶ 11. The wall’s
8 failure would probably result in a landslide, causing the fill soil from Plaintiffs’ property to
9 inundate the Kennedys’ property below. *Id.* ¶¶ 12, 20. In addition to the tree roots aggravating the
10 threat of the wall’s collapse, there was also some risk that the trees would fall onto the Kennedys’
11 property should the wall fail and release the fill soil supporting the trees. *Id.* ¶¶ 17, 20.

12 From May to October 2012, the Kennedys repeatedly expressed their concerns to Plaintiffs.
13 ECF No. 8-2, Ex. A at 3. The Kennedys made multiple visits and requests to Plaintiffs to replace
14 the wall and remove the trees, and even suggested alternative dispute resolution. *Id.* The
15 Kennedys also sent Plaintiffs a copy of the arborist’s report, which detailed the dangers posed by
16 the trees. Kennedys’ Compl. ¶ 18. Despite having knowledge of the condition of the wall and
17 trees and the distress these hazards caused the Kennedys, Plaintiffs refused to take any corrective
18 action. *Id.*

19 Unable to resolve the issue with Plaintiffs directly, the Kennedys filed suit against Plaintiffs
20 on February 15, 2013, in Santa Cruz County Superior Court, seeking declaratory and injunctive
21 relief as well as damages. The Kennedys’ complaint alleged that the wall and trees on Plaintiffs’
22 property constituted a private nuisance. Kennedys’ Compl. ¶ 20. The complaint further alleged
23 that Plaintiffs had “acted unreasonably by failing to take action to remedy these hazards.” *Id.* ¶ 21.

24 The Superior Court held a three-day bench trial starting on October 15, 2013. ECF No. 8-2,
25 Ex. A at 2. At trial, Plaintiffs conceded that the retaining wall needed to be replaced and that
26 Tree 1 needed to be removed. *Id.* at 4. Plaintiffs also testified that they did not appreciate the
27 manner in which the Kennedys had approached them and, thus, “decided not to do anything in
28 response” to their neighbors’ requests to repair the wall and remove the trees. *Id.* at 3.

1 On November 8, 2013, the Superior Court ruled in favor of the Kennedys, declaring the
2 retaining wall and trees to be nuisances. *Id.* at 8-10. Plaintiffs were ordered to replace the wall and
3 remove the trees and to pay \$8,000 in monetary damages to the Kennedys for discomfort and
4 annoyance. *Id.*

5 **C. The Insurance Dispute and This Litigation**

6 In February or March 2013, Plaintiffs tendered defense of the underlying litigation to
7 Defendant. Defendant denied coverage in a response letter dated March 22, 2013. *See* ECF No. 2,
8 Ex. C to Pls.’ Compl. (“Allstate Letter”). In the letter, Defendant stated that the Policy did not
9 cover the allegations of the underlying complaint because it only covered “accidents” resulting in
10 “bodily injury” or “property damage,” and that the Policy excluded coverage for damage to
11 property owned or used by an insured. *See id.* at 2. Defendant gave Plaintiffs the opportunity to
12 provide additional information or considerations if they believed Defendant had unfairly or
13 erroneously denied coverage. *See id.* at 6. Plaintiffs have not alleged that they supplied additional
14 information to Defendant.

15 Rather, on January 16, 2014, Plaintiffs brought the instant litigation in Santa Cruz County
16 Superior Court against Defendant for breach of written contract and breach of implied covenant of
17 good faith and fair dealing, seeking compensatory and punitive damages, prejudgment interest, and
18 attorney’s fees. *See* ECF No. 1 ¶¶ 1-2. Attached to the complaint were the Policy, the Kennedys’
19 complaint in the underlying litigation, and Defendant’s letter denying coverage. *See* ECF No. 2.
20 Defendant removed the action to this Court on February 24, 2014. *See id.*

21 On March 3, 2014, Defendant filed a Motion to Dismiss. *See* ECF No. 8. The Court
22 granted the motion with leave to amend on June 5, 2014, ruling that “Plaintiffs have not alleged
23 facts that state a claim with respect to Defendant’s duty to defend.” ECF No. 23 at 13. The Court
24 so held because the “conduct in the underlying complaint”—to wit, the failing condition of the
25 retaining wall and trees and Plaintiffs’ refusal to remove either—was “expected,” “intentional,”
26 and “not accidental.” *Id.* at 11, 13. “Defendant,” the Court concluded, “is not required to defend
27 Plaintiffs with respect to the underlying litigation where no possibility of coverage exists.” *Id.* at
28 13. The Court also rejected Plaintiffs’ failure to investigate claim because “there is no continuing

1 duty on the insurer to investigate potential coverage once it has refused to defend the lawsuit on the
2 basis of the third-party complaint and extrinsic facts known to it at [the] time of tender.” *Id.* at 14.

3 On June 26, 2014, Plaintiffs filed a first amended complaint (“FAC”), adding six new
4 substantive paragraphs to their original allegations. ECF No. 25. In response, Defendant filed the
5 instant Motion to Dismiss and Motion to Strike Plaintiffs’ request for punitive damages on July 14,
6 2014. ECF No. 26. Plaintiffs filed their Opposition on July 28, 2014. ECF No. 30. Defendant
7 filed a Reply on August 4, 2014. ECF No. 31.

8 II. **LEGAL STANDARDS**

9 A. **Motion to Dismiss**

10 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include “a
11 short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint
12 that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure
13 12(b)(6). The Supreme Court has held that Rule 8(a) requires a plaintiff to plead “enough facts to
14 state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
15 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the
16 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
17 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a probability
18 requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.”
19 *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, the Court
20 “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light
21 most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d
22 1025, 1031 (9th Cir. 2008).

23 The Court, however, need not accept as true allegations contradicted by judicially
24 noticeable facts, *see Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it “may look
25 beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6)
26 motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir.
27 1995). Nor must the Court “assume the truth of legal conclusions merely because they are cast in
28 the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per

1 curiam) (internal quotation marks omitted). Mere “conclusory allegations of law and unwarranted
2 inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183
3 (9th Cir. 2004); *accord Iqbal*, 556 U.S. at 678. Furthermore, “a plaintiff may plead herself out of
4 court” if she “plead[s] facts which establish that [s]he cannot prevail on h[er] . . . claim.” *Weisbuch*
5 *v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (internal quotation marks omitted).

6 **B. Leave to Amend**

7 If the Court determines that the complaint should be dismissed, it must then decide whether
8 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend
9 “should be freely granted when justice so requires,” bearing in mind that “the underlying purpose
10 of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or
11 technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (ellipsis in original)
12 (internal quotation marks omitted). Nevertheless, the Court may deny leave to amend because of
13 “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure
14 deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of
15 allowance of the amendment, [and] futility of amendment.” *Leadsinger, Inc. v. BMG Music*
16 *Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008) (alteration in original) (quoting *Foman v. Davis*, 371
17 U.S. 178, 182 (1962)).

18 **III. DISCUSSION**

19 Plaintiffs allege breach of written contract and breach of the implied warranty of good faith
20 and fair dealing. In particular, Plaintiffs allege that Defendant breached the contract and the
21 implied warranty of good faith and fair dealing by: (1) failing to defend Plaintiffs in the underlying
22 litigation brought by the Kennedys despite a duty to do so; and (2) failing to adequately investigate
23 the underlying litigation prior to the denial of defense and indemnification. Plaintiffs also seek
24 punitive damages on grounds that Defendant’s breach of contract was willful, malicious, and in
25 conscious disregard of Plaintiffs’ rights.

26 As in its prior order granting Defendant’s Motion to Dismiss, *see* ECF No. 23, the Court
27 addresses the failure to defend and the failure to investigate claims separately. Because Plaintiffs
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1 have not adequately alleged either set of claims, the Court once again grants Defendant's motion,
2 this time without leave to amend.

3 **A. Failure to Defend Claims**

4 Under California law, an insurer has a broad duty to defend insured entities against claims
5 that create a potential for indemnity. *See Montrose Chem. Corp. v. Super. Ct.*, 6 Cal. 4th 287, 295
6 (1993). The duty to defend is broader than the duty to indemnify, *see Horace Mann Ins. Co. v.*
7 *Barbara B.*, 4 Cal. 4th 1076, 1081 (1993), but it is not unlimited, *see Waller v. Truck Ins. Exch.*,
8 *Inc.*, 11 Cal. 4th 1, 19 (1995). In determining whether there is a duty to defend, the Court must
9 look to the complaint in the underlying litigation and “*all* facts known to the insurer from any
10 source.” *Montrose Chem.*, 6 Cal. 4th at 300. The critical question, then, is whether the facts
11 known to the insurer at the time it refused to defend the underlying lawsuit created any potential
12 for coverage under the insurance policy. *See Gunderson v. Fire Ins. Exch.*, 37 Cal. App. 4th 1106,
13 1114 (1995). If there was no potential for coverage based on the underlying complaint and
14 extrinsic facts made known to the insurer, then the insurer has not breached the insurance contract
15 by refusing to defend. *See Montrose Chem.*, 6 Cal. 4th at 295.

16 Here, the Policy states that an “occurrence” is an “accident, including continuous or
17 repeated exposure to substantially the same general conditions during the policy period, resulting in
18 bodily injury or property damage.” Allstate Policy at 3. Although the Policy does not further
19 define accident, it is settled under California law that an “accident” for insurance coverage
20 purposes must be “an unexpected, unforeseen, or undesigned happening or consequence from
21 either a known or unknown cause.” *Hogan v. Midland Nat'l Ins. Co.*, 3 Cal. 3d 553, 559 (1970)
22 (quoting *Geddes & Smith, Inc. v. Saint Paul-Mercury Indem. Co.*, 51 Cal. 2d 558, 563-64 (1959)).
23 Furthermore, the Policy expressly allows gradual events to be considered accidental. The events at
24 issue need not happen instantaneously.

25 For Defendant to have found the potential for coverage under the Policy as an
26 “occurrence,” there must have been some “accident” based on the underlying claim and extrinsic
27 facts known to Defendant at the time of tender. In its June 5 order, the Court found no such
28 possibility of coverage because the failing condition of the retaining wall and trees as well as

1 Plaintiffs' refusal to replace the wall and remove the trees in response to the Kennedys' concerns
2 were not accidental—these events were either expected or intentional. *See* ECF No. 23 at 6-14. To
3 survive the latest Motion to Dismiss, therefore, Plaintiffs must allege new facts, known to
4 Defendant at the time of tender, suggesting that either event could have been accidental. Having
5 reviewed Plaintiffs' FAC, which includes six new substantive paragraphs,¹ the Court concludes
6 that no such facts have been alleged.

7 As relevant here, paragraphs 9 and 11 allege that Plaintiffs were not aware of the risks
8 posed by the retaining wall or trees until May 2012, when the Kennedys first approached Plaintiffs
9 about the problems. ECF No. 25 ¶¶ 9, 11. Indeed, Plaintiffs allege that they did not even know the
10 retaining wall existed until the Kennedys raised the issue. *Id.* ¶ 9. But whether Plaintiffs were
11 unaware of the problems before May 2012 is of no moment. Assuming this allegation's truth, it
12 does not change the fact that deterioration of a twenty-year-old wooden wall or hillside tree is an
13 expected and foreseeable outcome. Nor does it change the fact that for nine months Plaintiffs
14 intentionally chose not to take any remedial action, despite repeated requests from the Kennedys
15 for Plaintiffs to replace the wall and remove Tree 2. It was precisely Plaintiffs' failure to take such
16 corrective action that prompted the Kennedys to file suit in February 2013. *See* Kennedys' Compl.
17 ¶ 18 (alleging that Plaintiffs "refused to take any action to remedy the man-made and natural
18 hazards on their property"); *id.* ¶ 21 (bringing a private nuisance action because Plaintiffs "acted
19 unreasonably by failing to take action to remedy these hazards").

20 Whether Plaintiffs considered themselves justified in failing to take any remedial action is
21 equally immaterial. It matters not that Plaintiffs may have thought Defendant would investigate
22 further, ECF No. 25 ¶ 12; that Plaintiffs may have disagreed with the methods of the Kennedys'
23 arborist, *id.* ¶ 13; or that Plaintiffs may have felt the Kennedys' demands were unreasonable, *id.*
24 ¶ 16. None of these allegations shows that the conduct giving rise to the underlying litigation—i.e.,
25 Plaintiffs' refusal to remedy the deterioration of their property—was in any way accidental.

26 In their Opposition, Plaintiffs acknowledge that "the only issue is whether the Kennedys'
27 claims against [them] constitute an 'accident' in the sense that they were unexpected or

28 ¹ These are paragraphs 9-13 and 16 of the FAC. *See* ECF No. 25 ¶¶ 9-13, 16.

1 unintended.” ECF No. 30 at 4. Plaintiffs acknowledge further that Defendant owes “no duty to
 2 defend under the policy until suit is filed.” *Id.* at 4 n.2. Nevertheless, Plaintiffs contend that
 3 coverage was “established” in May 2012, when the Kennedys first made their request and Plaintiffs
 4 notified Defendant of the issue. *Id.* at 4. The duty to defend was triggered, Plaintiffs argue,
 5 because Defendant could not eliminate the possibility of coverage under the policy as of May 2012.
 6 *Id.* at 4-5.

7 Plaintiffs are mistaken. Nothing in the Kennedys’ complaint was predicated on Plaintiffs’
 8 lack of knowledge of the wall’s deterioration prior to May 2012. Instead, it was based on
 9 Plaintiffs’ refusal to take corrective action in response to an expected, natural event of which they
 10 had been notified. *See* Kennedys’ Compl. ¶¶ 18, 21, 28. Because the Kennedys’ claims arose out
 11 of expected or intentional conduct, Defendant properly determined that there was no potential for
 12 coverage under the Policy.² *See State Farm Gen. Ins. Co. v. Frake*, 197 Cal. App. 4th 568, 581
 13 (2011) (“The mere fact that [Plaintiffs] did not intend to injure [the Kennedys] does not transform
 14 [their] intentional conduct into an accident.”).

15 Plaintiffs’ citations to *Montrose Chemical Corp. v. Superior Court*, 6 Cal. 4th 287 (1993),
 16 and *Shell Oil Co. v. Winterthur Swiss Insurance Co.*, 12 Cal. App. 4th 715 (1993), remain
 17 inapposite for the same reasons detailed in the Court’s June 5 order. As stated previously, nothing
 18 in the underlying complaint in *Montrose Chemical* or the extrinsic evidence known to the insurer
 19 “establish that [the insured] expected or intended the property damage that allegedly resulted.”⁶ 6
 20 Cal. 4th at 304. Here, by contrast, the underlying complaint explicitly stated that the Kennedys had
 21 informed Plaintiffs of the injury and the threat of damage that resulted therefrom. *See* Kennedys’
 22 Compl. ¶ 18. What’s more, *Shell Oil*’s holding that “[t]he plain meaning of ‘expected’ does not
 23 include ‘should have known’” provides Plaintiffs no refuge. 12 Cal. App. 4th at 746. The facts, as

24 ² Plaintiffs’ falling tree hypothetical is unavailing for similar reasons. *See* ECF No. 30 at 8.
 25 In the situation Plaintiffs imagine—i.e., where Tree 2 unexpectedly fell on the Kennedys’ roof in
 26 May 2012, before Plaintiffs had been made aware of the risk it posed—they might well have a
 27 claim against Defendant. But that is not what happened here. A more apt comparison would be if
 28 Tree 2 had suddenly fallen on the Kennedys’ roof in February 2013, nine months after they had
 notified Plaintiffs of its deterioration, and yet despite the neighbors’ repeated pleas Plaintiffs had
 done nothing in the interim to remedy the danger. In such a case, as here, Defendant would owe
 Plaintiffs no duty to defend.

1 Plaintiffs allege, indicate that they were *subjectively* aware of the injury to the Kennedys caused by
2 their refusal to replace the wall and remove the trees—viz., the Kennedys’ discomfort and inability
3 to enjoy their property. Whether Plaintiffs “should have known” of the gradual deterioration is
4 irrelevant when they actually knew that the state of their property was upsetting to the Kennedys
5 and that their inaction was “substantially certain” to result in the Kennedys’ continued distress. *Id.*
6 at 748; *see also id.* at 751 (“[W]here damage is the direct and immediate result of an intended or
7 expected event, there is no accident.”).

8 In sum, Plaintiffs’ FAC alleges no new facts suggesting that the conduct giving rise to the
9 underlying complaint was somehow accidental. As Defendant is not required to defend Plaintiffs
10 with respect to the underlying litigation where no possibility of coverage exists, there was no
11 breach of contract for failure to defend.³ All claims alleging breach of contract or of the implied
12 covenant of good faith and fair dealing stemming from Defendant’s failure to defend are hereby
13 dismissed.

14 **B. Failure to Investigate Claims**

15 Plaintiffs also allege that Defendant was required to conduct a more thorough investigation
16 to discover facts in support of Defendant’s duty to defend. Paragraph 12 of the FAC states that
17 Plaintiffs contacted one of Defendant’s insurance agents within a reasonable period of time after
18 the Kennedys’ May 2012 visit. ECF No. 25 ¶ 12. In addition, Plaintiffs allege that they explained
19 the situation to one of Defendant’s insurance adjusters, who had contacted Plaintiffs following their
20 initial reporting of the claim. *Id.* According to Plaintiffs, Defendant took no further action to
21 investigate the matter. *Id.*

22 Plaintiffs’ FAC does not state a claim for failure to investigate. Defendant satisfied its
23 obligation to investigate Plaintiffs’ claim by comparing the terms of the Policy with the underlying
24 complaint filed by the Kennedys, taking into account all extrinsic facts provided by Plaintiffs.
25 Under California law, the duty of the insurer is fully discharged by review of the underlying

26 _____
27 ³ The Court need not determine whether the underlying complaint and extrinsic facts satisfy
28 the Policy’s requirement that “bodily injury” or “property damage” have occurred. Nor must the
Court reach Defendant’s plea to strike Plaintiffs’ request for punitive damages. *See* ECF No. 23 at
13-14.

1 complaint and the insurance policy. *See Horace Mann*, 4 Cal. 4th at 1081 (“The determination
2 whether the insurer owes a duty to defend usually is made in the first instance by comparing the
3 allegations of the complaint with the terms of the policy.”); *Baroco W., Inc. v. Scottsdale Ins. Co.*,
4 110 Cal. App. 4th 96, 103 (2003) (“After receiving a tender of defense, the insurer satisfies its duty
5 to investigate by considering the complaint and the terms of the policy. Although extrinsic facts
6 may also give rise to a duty to defend, such facts must be known at the time of tender and must
7 reveal a potential for liability.” (footnote omitted)). Contrary to Plaintiffs’ suggestion, *see ECF*
8 No. 30 at 8-10, Defendant was not required to inspect the site, speak to the Kennedys, or discuss
9 the claim in depth before making a determination regarding its duty to defend. So long as the
10 allegations in the Kennedys’ complaint, the terms of the Policy, and extrinsic facts known to
11 Defendant at the time did not “raise a single issue which could bring [the events] within the policy
12 coverage,” Defendant was relieved of its duty to defend. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263,
13 275 n.15 (1966). Such was the case here.

14 Moreover, there is no “continuing duty” on the insurer to investigate potential coverage
15 once it has refused to defend the lawsuit on the basis of the underlying complaint and extrinsic
16 facts known to it at the time of tender. *Gunderson*, 37 Cal. App. 4th at 1114. At the time the
17 Kennedys filed their complaint, there was no reason for Defendant to suspect that either the
18 condition of the retaining wall and trees or Plaintiffs’ refusal to replace them constituted accidents
19 triggering Defendant’s duty to defend. Furthermore, Defendant’s denial letter gave Plaintiffs the
20 opportunity to supply additional information or considerations should they disagree with the
21 decision. *See Allstate Letter* at 6. Plaintiffs’ FAC does not allege that they provided Defendant
22 any additional facts supporting coverage. Accordingly, Plaintiffs have not adequately alleged
23 breach of contract on a failure to investigate theory.

24 **IV. CONCLUSION**

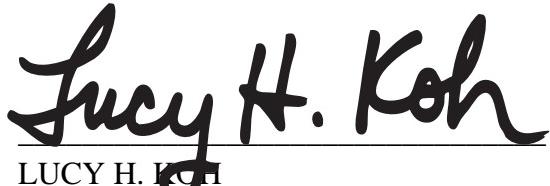
25 For the foregoing reasons, the Court GRANTS Defendant’s Motion to Dismiss without
26 leave to amend. Plaintiffs were already afforded an opportunity to allege additional facts about
27 which Defendant was aware that could trigger the duty to defend or the duty to investigate. They
28 have not. As a result, the Court finds that further amendment would be futile. *See Allen v. City of*

1 *Beverly Hills*, 911 F.2d 367, 373-74 (9th Cir. 1990) (affirming district court's dismissal and
2 denying plaintiff leave to amend where "any further amendment to the complaint would likely
3 prove futile").

4 The Clerk shall close the case file.

5 **IT IS SO ORDERED.**

6 Dated: October 1, 2014


LUCY H. KOH
United States District Judge